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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF R.H.,

Appellant-Respondent,

VS.

STATE OF INDIANA,

Appellee-Petitioner.

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No. 49A02-0601-JV-15

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0503-JD-1457

October 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

R.H. appeals the determination that he is a juvenile delinquent for committing acts that would be Class B felony and Class C felony child molesting if committed by an adult.¹ He raises one issue, which we expand and restate as:

1. Whether the child victim was competent to testify;
2. Whether the admission of a videotaped interview of the child victim was erroneous; and
3. Whether the evidence was sufficient to support the findings.

We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of March 15, 2005, five-year-old D.R. was at home with her father and her mother, Angela Romero. Also staying at the house that night were Rhonda Bush, who was to baby-sit D.R. the next morning while D.R.'s parents went to work, and Bush's fifteen-year-old son, R.H. D.R. slept in her upstairs bedroom, the Romeros slept in their upstairs bedroom, Bush slept on the couch downstairs, and R.H. slept in the bedroom next to D.R.'s room. In the middle of the night, D.R. woke up to find R.H. had his hand inside her underwear and was rubbing her "butt." (Tr. at 39.) He then put two fingers inside her "potty." (*Id.*) When R.H. left her room, D.R. went to her parents' bedroom and slept with them.

The next morning, R.H. went to school, and D.R. stayed in her parents' bed all morning. When Angela Romero returned home from work, D.R. told Romero that R.H.

¹ Ind. Code § 35-42-4-3.

touched her “potty and her butt.” (*Id.* at 48-50.) Romero called Bush and called the police.

Marion County Sheriff’s Deputy Steve Beasley responded to the call and arrived at the Romeros’ apartment within an hour. D.R. told Deputy Beasley that R.H. came “into her bedroom,” “placed his hands on the back side and into the back of her panties,” and “had touched her potty area.” (*Id.* at 59.) When D.R. told Deputy Beasley that R.H. “placed two fingers into her private area . . . , she raised two fingers in the air that [he] would – so that [he] would see what exactly she was she was [sic] stating and meaning with a visual.” (*Id.*) Deputy Beasley reported the incident to Detective Peter Buttram of the Sex Crimes Unit.

Detective Buttram referred the matter to Diane Bowers, a forensic child interviewer with the Child Advocacy Center. On March 21, 2005, Bowers conducted a videotaped interview of D.R., during which D.R. again alleged R.H. came into her bedroom at night and touched her “potty” and “butt” with his fingers inside her clothes. (Ex. 1.)

The State filed a petition alleging R.H. is a delinquent. After an initial hearing, the court found probable cause and appointed a public defender for R.H. The court held a hearing and determined the then six-year-old D.R. was competent to testify. At trial, D.R. testified about what happened, and Romero and Deputy Beasley testified regarding what D.R. told them on the day the event occurred. Over R.H.’s objection, the court also

watched the videotape of Bowers' interview of D.R.² The court found the allegations to be true. The court ordered R.H. a ward of the Indiana Department of Correction, suspended the commitment, and placed him on probation with special conditions.

DISCUSSION AND DECISION

1. Competence of D.R.

R.H. alleges D.R. was incompetent to testify. Determinations regarding a witness's competency are left to the sound discretion of the trial court. *Aldridge v. State*, 779 N.E.2d 607, 609 (Ind. Ct. App. 2002), *trans. denied* 792 N.E.2d 37 (Ind. 2003). We review the court's decision for a manifest abuse of discretion. *Id.*

Ind. Evidence Rule 601 provides: "Every person is competent to be a witness except as otherwise provided in these rules, or by act of the Indiana General Assembly."

The court must evaluate:

whether a child witness (1) understands the difference between telling a lie and telling the truth, (2) knows whether she is under a compulsion to tell the truth, and (3) knows what a true statement actually is.

Harrington v. State, 755 N.E.2d 1176, 1181 (Ind. Ct. App. 2001). In exercising its discretion, the court is to "determine whether a child is competent to testify based upon the judge's observation of the child's demeanor, responses to questions posed to her by counsel and the court." *Id.*

² Bowers took the stand, but she did not reiterate what D.R. had told her. She was asked only foundational questions, such as whether the videotape was authentic.

At the competency hearing, D.R. responded as follows to questioning by the State:

- Q Okay. Very good. Now tell us how old you are.
A I'm six.
Q You're six. And when's your birthday?
A April 29th.
Q Okay. You're doing really good. That's a good outdoor voice. Now where do you go to school?
A [answer omitted].
Q Okay and what grade are you in?
A First grade.
Q Okay. And what do you like about school.
A I like (inaudible.)
Q You do? Okay. Is there anything that you don't like about school?
A (Non-verbal response.)
Q What don't you like about school?
A I don't like to get chased by boys outside.
Q Okay. All right. Now, do you know the difference between the truth and a lie?
A Yes.
Q Okay. Very good. Now if I told you that there was a big old bunny rabbit hopping around here in this room, would that be the truth or a lie?
A Lie.
Q Why is it a lie?
A Because bunnies can't come in rooms and stuff like that. They only can stay outside.
Q Okay. And if I told you that this table right here or this area right here is green, would that be the truth or a lie?
A Truth – a lie!
Q Why? What color is that table?
A Um.
Q What color is this?
A I don't know.
Q Okay, but is it green?
A (Non-verbal response.)
Q Okay. All right. Now what happens if you get caught lying to mommy?
A You get a whooping.
Q Oh, is that something good or something bad?
A Bad.

Q Okay. Well, what do you think will happen if you get caught lying to this Judge right here, this is the Judge, what do you think will happen?

A You'll get in trouble.

Q Okay. Is that something good or something bad?

A Bad.

Q Okay. All right. Do you promise to do your best to tell the truth today?

A Yes.

(Tr. at 29-31.) Counsel for R.H. also questioned D.R.:

Q . . . So, If [sic] you are, um, if you tell a lie does that automatically mean that you are in trouble?

A Yes.

Q Okay. Very good. Um, Okay. And how old did you say that you were?

A Six.

Q You're six years old? And what grade are you in?

A First grade.

Q Okay. And when Ms. Clark earlier asked you about the bunnies, did you see any bunnies jumping around?

A No.

Q No. And that was a lie because?

A Bunnies can't get in rooms.

Q Because bunnies can't get in rooms or because the bunnies are here?

A Yeah. 'Cause bunnies aren't like in rooms that much.

(*Id.* at 32-33.)

R.H. asserts the court should have found D.R. incompetent and unavailable to testify because, when asked why it would be a lie to say there were bunnies in the courtroom, D.R. said "bunnies can't get in rooms." (*Id.* at 33.) R.H. insists to be competent D.R. needed to say it was a lie because there were no bunnies in the room. We disagree.

The test for competence is whether a child understands the difference between telling a lie and telling the truth, knows she is under a compulsion to tell the truth, and

knows what a true statement is. *Howard*, 816 N.E.2d at 955. We believe D.R.'s responses to the State's questioning indicated she was capable of all three.

Contrary to R.H.'s assertion, the competency test does not require her to have the abstract reasoning required to explain *why* something was the truth or a lie. For example, while D.R. needed to be able to truthfully report *what* happened in her room on that night in March 2005, she would not be expected to explain *why* R.H. molested her. R.H. thinks D.R.'s response regarding why bunnies were absent from the room was not the best response, but the fact remains it was a truthful response: "bunnies aren't like in rooms that much." (Tr. at 33.)

The trial court did not abuse its discretion when it found D.R. competent to testify.

2. Admission of Videotape

R.H. claims the court erred by admitting the videotape of Bowers' interview of D.R. However, "the admission of a videotape may be harmless error if it is no more than cumulative of the statements of a witness and the tape is not the only direct evidence of the events." *Taylor v. State*, 841 N.E.2d 631, 637 (Ind. Ct. App. 2006), *trans. denied*. After reviewing the videotape and transcript, we are convinced the videotape did not contain any material facts that were not included in the testimony of Romero, D.R., and Deputy Beasley. Because the videotaped interview of D.R. was cumulative of other evidence presented, any error is harmless. *See id.* (any error was harmless where video contained same evidence presented by three witnesses).

3. Sufficiency of Evidence

When the State seeks to have a juvenile adjudicated a delinquent, it must prove every element of the offense beyond a reasonable doubt. *C.T.S. v. State*, 781 N.E.2d 1193, 1200-01 (Ind. Ct. App. 2003), *trans. denied* 792 N.E.2d 45 (Ind. 2003). On review, we will not reweigh the evidence or judge the credibility of the witnesses. *Id.* at 1201. Rather, we look to the evidence and the reasonable inferences therefrom that support the true finding. *Id.* We will affirm the adjudication if evidence of probative value exists from which the fact finder could find the juvenile guilty beyond a reasonable doubt. *Id.* In other words, we will affirm the finding of delinquency unless we may conclude no reasonable fact finder could find the elements of the crime proven beyond a reasonable doubt. *Id.*

D.R. testified:

Q . . . Has anybody touched you somewhere where you didn't want to be touched?

A Yes.

Q Okay. Well, where did they touch you?

A On my potty and butt.

Q Okay. And who touched you on your potty and butt?

A [R.H.]

[Witness identifies R.H. in courtroom.]

Q Okay. Now, you said that [R.H.] touched your potty.

A Yes.

Q And when he touched your potty, what did he touch your potty with?

A His hands.

* * * * *

Q Okay. Now when he touched you with his hand – touched your potty with his hand, did he touch you over your clothes or under your clothes?

A Under them.

Q Okay. And did he touch you – when he touched you under your clothes did he touch you, um, over your underwear or over [sic] your underwear?

A Under.

Q Okay. And how many times did he touch you?

A I don't know how much on my butt, but he touched me once on my potty.

Q Okay. And did he touch you on the inside of your potty or the outside of your potty?

A Inside.

Q Okay. And how did that feel when he touched you on the inside of your potty?

A Bad.

Q Okay. And where were you when this happened, do you remember?

A In my bed.

Q Okay. And where was mommy?

A In her bed.

Q Okay. Did it happen at night or during the day?

A Night.

Q Okay. And when this happened were your clothes on or off?

A On.

Q Okay. Did you tell anybody about this? Did you tell anybody that [R.H.] touched you on your potty?

A Yes.

Q Who did you tell?

A My mom.

(Tr. at 37-40.)

Romero gave the following description of what happened when she returned from work on March 16, 2005:

[W]hen I came in from work [D.R.] was still in bed, she hadn't got [sic] out of bed yet. So kind of like she waited for me to get there to tell me. But she came down and Rhonda left and as soon as she left she started crying and said that she had to tell me something and I asked her what it was and that's when she told me that [R.H.] came in her room and touched her – her potty and her butt is what she said.

* * * * *

. . . She said that he came into her room while she was asleep and that she woke up to him rubbing on her butt and poking her in her potty is what she said and she had her fingers like this and just describe [sic] the poking like

this to me so that's how I knew something – something was wrong that's why I called –

[STATE]: Let the record reflect that when the witness was describing that she held up two fingers and went – made a poking motion.

(*Id.* at 49-50.)

Deputy Beasley testified the following occurred when he interviewed D.H. less than one hour after she told Romero what happened:

She made three statements that drew my attention to this particular run. She stated that number one, [R.H.] had been spending the night along with his mother Rhonda Bush and some time in the early morning hours [R.H.] had went [sic] into her bedroom and had placed his hands on the back side and into the back of her panties. Uh, second statement that was quoted was that [R.H.] had touched her potty area and in my report I stated that in my mind she was stating her vagina area, which a five year old would probably say words of that nature. And the third comment she made to me was – or statement she made to me was that [R.H.] had placed two fingers into her private area and as she was making that statement, she raised two fingers in the air that I would – so that I would see what exactly she was she was [sic] stating and meaning with a visual.

(*Id.* at 59.) He described D.H.'s demeanor: "she was – in a five year old status, she was a little agitated, a little laughing, crying, upset, embarrassed, things of that nature. She – in that situation would probably justify the way she was acting." (*Id.* at 60.)

This evidence is sufficient for the court to find beyond a reasonable doubt that R.H. committed acts that would be Class B felony and Class C felony child molesting if committed by an adult. Accordingly, we affirm.

Affirmed.

BAILEY, J., and RILEY, J., concur.